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UNITED STATES OF AMERICA  
13

14 UNITED STATES DISTRICT COURT

15 FOR THE CENTRAL DISTRICT OF CALIFORNIA

16 UNITED STATES OF AMERICA,

17 Plaintiff,

18 v.

19 JOHN JACOB OLIVAS,

20 Defendant.  
21

ED CR No. 18-231-JGB

GOVERNMENT'S TRIAL MEMORANDUM

Trial Date: November 29, 2022  
Location: Courtroom of the  
Hon. Jesús G. Bernal

22 Plaintiff United States of America, by and through its counsel  
23 of record, the United States Attorney for the Central District of  
24 California and Assistant United States Attorneys Eli A. Alcaraz and

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1 Frances S. Lewis, hereby files its trial memorandum for the retrial  
2 of defendant John Jacob Olivas.

3 Dated: November 26, 2022

Respectfully submitted,

4 E. MARTIN ESTRADA  
United States Attorney

5 SCOTT M. GARRINGER  
6 Assistant United States Attorney  
Chief, Criminal Division

7 /s/  
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FRANCES S. LEWIS  
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10 Attorneys for Plaintiff  
11 UNITED STATES OF AMERICA  
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**MEMORANDUM OF POINTS AND AUTHORITIES****I. INTRODUCTION**

In 2011 and 2012, defendant John Jacob Olivas ("defendant") was a Special Agent with United States Immigration and Customs Enforcement ("ICE"), Homeland Security Investigations ("HSI"), formerly known as "ICE, Office of Investigations." Instead of using his badge, service firearm, and federal law enforcement power to better his community, defendant used his position and power for his own personal gratification: sexually abusing and attempting to sexually abuse two of his intimate partners and preventing them from reporting his sexual assaults, as well as other acts of violence, to law enforcement. Defendant's abuse of his federal law enforcement authority violated the victims' constitutional rights: namely, their rights to liberty and bodily integrity. For two specific sexual assaults of N.B. and one attempted sexual assault of K.L., defendant is charged with three counts of deprivation of rights under color of law, in violation of 18 U.S.C. § 242.

Defendant's first trial on these charges began in November 2021. On December 15, 2021, this Court declared a mistrial after the jury deadlocked on all three counts. The retrial is presently set to begin on November 29, 2022.

**II. SCHEDULING MATTERS****A. Trial Estimate**

The United States estimates that its case-in-chief will last approximately six to eight court days, including and depending on cross examination, the outcome of proposed stipulations, and whether the Court will permit the pre-admission of exhibits. At the October 17, 2022 pretrial conference, the Court ruled that the parties'

1 opening statements could be up to 30 minutes. The United States  
2 respectfully requests leave to present a rebuttal case if defendant  
3 presents a case and call witnesses.

4 Except for Jesse Macias, as described below, all the witnesses  
5 that the United States may potentially call at the retrial are listed  
6 in the Government's Witness List ("Original Witness List") and/or  
7 described in the Government's Trial Memorandum ("Original Trial  
8 Memo") filed in advance of the first trial on November 26 and 29,  
9 2021. (Dkts. 137, 148.) The United States is still finalizing which  
10 of these witnesses it intends to call at the retrial and whether to  
11 make any changes to the witnesses called during the last trial or the  
12 witness order. The United States may not call every witness on the  
13 list and may also call some of the witnesses on the list that were  
14 not called at the first trial.

15 Finally, the United States reserves the right to call additional  
16 witnesses not identified in the Original Trial Memo or Original  
17 Witness List as warranted by the presentation of the evidence at  
18 trial.

19 **B. Scheduling Medical Professional Testimony**

20 The United States intends to call two witnesses who are medical  
21 professionals: Dr. Jessie Rollins, who treated N.B. after defendant  
22 assaulted her in early November 2012, and Dr. Janine Shelby, the  
23 government's noticed expert on intimate partner violence. As was  
24 permitted at the first trial, the United States respectfully requests  
25 that these witnesses be able to testify out of order to prevent any  
26 adverse impacts on their patients with scheduled appointments.  
27 Specifically, the United States intends to call Dr. Rollins as the  
28 first witness of the day on Thursday, December 1, 2022, and Dr.

1 Shelby as the first witness of the day on Thursday, December 8, 2022,  
2 even if another witness is on the stand. The United States has  
3 conferred with defense counsel about this issue and as reflected at  
4 the October 17, 2022 pretrial conference in this case, defendant does  
5 not object.

6 **C. Case Agent Testimony**

7 As discussed at the October 17, 2022 pretrial conference, the  
8 United States anticipates calling the case agent, FBI Special Agent  
9 David Staab, twice during its case-in-chief. Agent Staab is expected  
10 to testify early in the case about his investigation, including his  
11 collection and review of relevant evidence in this case. Agent  
12 Staab, however, also interviewed all the victims in this case. Thus,  
13 to the extent their credibility is attacked on cross-examination,  
14 thereby making their prior consistent statements admissible,<sup>1</sup> the  
15 United States intends to recall Agent Staab at the end of its case-  
16 in-chief to introduce such statements after the victims have  
17 testified. Defense counsel has no objection to Agent Staab  
18 testifying twice, as discussed at the October 17, 2022 pretrial  
19 conference in this case, and the Court agreed to permit Agent Staab  
20 to testify at two points during the United States' case-in-chief.

21 **D. Exhibit Stipulations**

22 The United States has provided defense counsel a draft exhibit  
23 list, including advanced electronic copies of the new exhibits in  
24 this case. The parties are presently discussing a stipulation  
25 regarding the pre-admissibility of any exhibit that was introduced at  
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27 <sup>1</sup> The Original Trial Memo set forth the law on the admissibility  
28 of prior consistent statements as substantive evidence after cross-  
examination.

1 the first trial, as well as a stipulation regarding the authenticity  
2 and foundation of the government's exhibits, specifically the  
3 exhibits taken from the digital devices, which will streamline the  
4 presentation of evidence at trial and obviate the need to call the  
5 forensic experts.

6 **E. Potential Defense Case**

7 Defendant has not provided notice that he intends to rely on any  
8 affirmative defenses or present an affirmative case. The United  
9 States anticipates that defendant again will rely largely on attacks  
10 on the credibility of the victims in this case. The United States  
11 also anticipates that defendant may try to introduce one or more of  
12 the following pieces of inadmissible evidence at trial:

13 1. Testimony from District Attorney Tara Powell

14 On October 19, 2022, the United States filed a Declaration of  
15 Deputy District Attorney Tara Powell, née Tara Foy, in support of its  
16 motion to introduce defendant's statements at his state change of  
17 plea hearing in September 2015. (Dkts. 204, 221.) On October 24,  
18 2022, with trial set to start the following day on October 25, 2022,  
19 defendant issued a subpoena<sup>2</sup> to Ms. Powell to appear at trial.  
20 During the pretrial conference that afternoon, the Court indicated  
21 that intended to grant the government's motion, and trial was  
22 continued to November 29, 2022.

23 Defendant has not reissued a subpoena for Ms. Powell to testify  
24 at the upcoming trial on November 29, 2022, or for any documents.  
25 Both the United States and the Riverside District Attorney's Office  
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27 <sup>2</sup> The subpoena was both for testimony and for documents.  
28 Defense counsel did not seek approval from the Court for documents,  
which is required where a defendant lacks the ability to pay and  
intends to apply for reimbursement. Fed. R. Crim. Pro. 17(b).

1 have asked defense counsel multiple times if she intends to issue a  
2 new subpoena to Ms. Powell and have made clear that if so, both  
3 entities would move to quash such a subpoena. Defense counsel has  
4 not responded.

5 Deputy District Attorney Tara Powell's testimony would serve no  
6 admissible purpose at the upcoming retrial. She did not witness any  
7 of the underlying facts in this case and played no role at all in  
8 this case until well after N.B. reported the crime in October 2013  
9 and the case was presented to the Riverside District Attorney's  
10 Office. She also played no independent role investigating the case,  
11 which was handled by the Riverside Police Department, and later the  
12 FBI. At most, she is a witness to defendant's statements at his  
13 September 2015 state change of plea hearing. But no witness  
14 testimony from that hearing is required -- a court reporter  
15 transcribed the hearing and has certified her transcript as accurate.  
16 Thus, the transcript should be admissible as self-authenticating  
17 under Federal Rule of Evidence 902(4).

18 The United States has also gone to great lengths to sanitize  
19 this transcript and other aspects of its case-in-chief to avoid  
20 making any reference to the existence of state criminal proceedings.  
21 There would simply be no way to introduce any testimony by Ms. Powell  
22 without explaining who she is or her role in this case, thereby  
23 opening the door to the introduction of the state criminal  
24 proceedings.

25 Trial is also not the proper forum for defendant to collaterally  
26 attack his change of plea hearing or his state court convictions. To  
27 the extent defendant expects to use Ms. Powell, or anyone else, to  
28 relitigate the threshold evidentiary questions about the

1 admissibility of his statements and whether the September 2015  
2 hearing was, in fact, a guilty plea hearing, that issue has been  
3 resolved by this Court and should not be discussed in the presence of  
4 the jury. Both parties submitted declarations in support of their  
5 positions on the motion in limine: the United States from Ms. Powell;  
6 defendant from Mr. Greenberg, his state attorney. Defendant did not  
7 ask for an evidentiary hearing or the opportunity to cross-examine  
8 Ms. Powell as to the statements in her declaration, and this Court  
9 has already ruled on the foundational factual questions presented by  
10 the competing declarations when it ruled that the hearing was a  
11 guilty plea hearing. (Dkt. 227.)

12 As this Court held, the federal case is not the proper forum for  
13 defendant to collaterally attack the voluntariness of his guilty  
14 plea. (Id. at 14-15.) If he wishes to take the stand and testify  
15 that his admissions were, in fact, false or made under duress, he is  
16 free to do so. But he should not be permitted to call other  
17 witnesses to make that implication for him, be they his father, his  
18 defense attorney, or the state prosecutor.

19 2. Rule 412 Evidence

20 The government's unopposed motion to exclude Rule 412 evidence  
21 (dkt. 101) was granted at the pretrial conference before the first  
22 trial on November 22, 2021. Nonetheless, at trial, and without prior  
23 notice to the victims or compliance with Rule 412(c), defendant  
24 introduced testimony about the charged victims' alleged consensual  
25 sexual behavior with defendant under Rule 412(b)(1)(B). To the  
26 extent defendant intends to introduce any additional testimony or  
27 evidence about the victims' sexual behaviors concerning defendant  
28 beyond what was introduced at the first trial, or to ask questions

1 about any sexual behaviors by the victims with regard to other  
2 individuals -- and defendant has given no notice of such intent --  
3 the United States maintains its objection under Rule 412.

4           3.     Defendant's Alleged Good Character

5           The government's unopposed motion to exclude good character  
6 evidence (dkt. 81) was granted at the pretrial conference before the  
7 first trial on November 22, 2021. At the first trial, defendant  
8 called two witnesses who knew him during 2011 and 2012: his oldest  
9 son, J.O., and his friend, B.H. Both witnesses testified purely to  
10 factual matters, not defendant's character.

11           To the extent defendant intends to introduce evidence of his  
12 good character at the second trial, the United States maintains its  
13 prior objection. The United States has also produced the criminal  
14 history of defendant's son, J.O., which reflects a recent misdemeanor  
15 conviction for domestic violence. The United States reserves the  
16 right to introduce such evidence to the extent J.O. testifies again,  
17 depending on the content of that testimony and whether it opens the  
18 door to the admissibility of his prior criminal conviction.<sup>3</sup>

19 **III. PRIOR TRIAL MEMORANDUM AND BRIEFING OF LEGAL ISSUES**

20           The Original Trial Memo set forth the facts as to the overall  
21 prosecution and the relevant law for the trial and charges in this  
22 case. (Dkt. 137.) The United States incorporates by reference the  
23 legal discussion from that memorandum, which anticipates certain of  
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26           <sup>3</sup> Such a misdemeanor conviction does not bear on truthfulness  
27 under Rules 608 and 609. But, to the extent J.O. testifies in a  
28 manner that suggests to the jury that he takes domestic violence  
seriously and he would remember or know if he ever saw his father  
engage in such behavior, the fact that he himself has been convicted  
of domestic violence would directly undermine his credibility. As  
the Court is well aware, credibility is always relevant.

1 the fundamental legal issues in this case, as well as the statement  
2 of the charges, the elements, and the facts of this case, all of  
3 which were born out at trial.

4 Specifically, the Original Trial Memo addressed the  
5 admissibility of, among other topics: (1) defendant's prior  
6 statements; (2) statements to the defendant; (3) medical evidence and  
7 testimony; (4) the victims' prior consistent statements; (5) business  
8 records, video and photographic records, and records from Facebook  
9 and Instagram; and (6) expert testimony, including by Dr. Shelby and  
10 by the forensic examiners. Although the parties are meeting and  
11 conferring about the possibility of pre-admitting the exhibits that  
12 were admitted at the first trial in an effort to streamline the  
13 retrial, absent such a stipulation, the United States anticipates  
14 that its prior analysis of all of those legal and evidentiary issues  
15 will remain applicable at the upcoming retrial.

#### 16 **IV. ADDITIONAL LEGAL AND EVIDENTIARY ISSUES**

17 In addition to the issues already identified in the Original  
18 Trial Memo, the United States anticipates that the following topics  
19 could be in dispute at the retrial if the parties are unable to reach  
20 agreement:

##### 21 **A. Evidence from Defendant's Digital Devices**

22 After the first trial had started, the United States learned for  
23 the first time that defendant had preserved records from one of his  
24 digital devices that he intended to admit at trial even though such  
25 materials had never been produced in reciprocal discovery. First,  
26 during cross-examination of victim K.L., defendant asked questions  
27 about purported text messages between K.L. and defendant in February  
28 2012 after he had attempted to rape her. And second, defendant

1 called a forensic expert, Ernest Koeberlein, who testified that he  
2 was given six physical cell phones and a 2015 iPhone backup copy that  
3 he understood all came from defendant and that he had reviewed for  
4 sexually explicit content.

5 Despite multiple requests for reciprocal discovery before the  
6 first trial, in violation of Rule 16, defendant did not provide any  
7 of these materials to the United States before the first trial.  
8 After the first trial, the United States renewed its request for  
9 reciprocal discovery. In August 2022, defendant provided the United  
10 States with:

11 (1) four Blacklight/Lantern extraction reports in PDF format,  
12 identified as follows:

13 (a) "blacklight.pdf";

14 (b) "Lantern Report\_2015-0041\_Olivas iPhone.pdf";

15 (c) "2014-0004.pdf"; and

16 (d) "2015-0041\_Olivas iPhone photos.pdf"; and

17 (2) a .zip file called "2015-0041\_blacklight report html\_Olivas  
18 iPhone.zip"

19 that reflected extractions conducted in or around August 2015 by  
20 Jesse Macias, defendant's Private Investigator, of materials that Mr.  
21 Macias represented had been provided by defendant (collectively,  
22 "defendant's phone").

23 The FBI then used a software tool called Axiom to access the  
24 contents in a reviewable format. The contents are merely a subset of  
25 what would have been on defendant's actual phone from the relevant  
26  
27  
28

1 time period,<sup>4</sup> and thus appear to just be a selection of data as  
2 marked by Mr. Macias or another investigator in 2015. All that being  
3 said, no party disputes that the data at one point originated on a  
4 digital device used by defendant.

5 The United States has identified numerous additional exhibits  
6 from defendant's phone that it intends to introduce at trial and has  
7 provided those exhibits to defendant, first by list on October 23,  
8 2022, and then by electronic copy on November 7, 2022 and by  
9 supplemental electronic copy on November 25, 2022. The parties are  
10 presently discussing a stipulation regarding the authenticity of  
11 those exhibits that would obviate the need to call Mr. Macias to the  
12 stand at trial to authenticate the extractions or their source.

13 **B. Forensic Extractions of N.B. and D.B.'s Devices**

14 At the first trial, the United States introduced numerous  
15 exhibits that were text messages extracted from: (1) an iPhone 4s  
16 belonging to victim N.B.; (2) an iPhone 4 belonging to victim N.B.'s  
17 mother, D.B.; and (3) a Motorola Droid cell phone and accompanying SD  
18 card belonging to victim N.B. The United States laid the foundation  
19 for the admissibility of these exhibits and the metadata reflected  
20 therein in three ways: (1) the testimony of Agent Staab, who reviewed  
21 the devices, (2) the testimony of N.B., who was a party to all of the  
22 relevant messages, and (3) the testimony of Murrieta Police  
23 Department Detective Paul C. Johnson, Computer Forensic Examiner with  
24 the Orange County Regional Computer Forensic Laboratory for the FBI,

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26  
27 <sup>4</sup> As Agent Staab is anticipated to testify, whole swaths of data  
28 categories are missing, like GPS and calendar entries, and the data  
starts and ends at random time periods, among other aspects that one  
would expect when reviewing the contents of complete forensic image  
of a digital device.

1 who performed extractions of the government's forensic evidence in  
2 this case.

3 Detective Johnson's testimony was necessitated out of an  
4 abundance of caution because defendant would not stipulate to the  
5 sufficiency of the foundation that was laid by Agent Staab and N.B.  
6 The parties are presently negotiating a stipulation that would  
7 obviate the need for Detective Johnson's testimony at the retrial.

8 The United States had also previously noticed James M. Watkins,  
9 Jr., a retired FBI Computer Analysis Response Team Examiner. Now  
10 that the United States is in possession of data from defendant's  
11 phone through the program tool Lantern, the United States has  
12 supplemented its expert notice to include opinions by Mr. Watkins  
13 about how Lantern organizes recovered text messages.

14 **C. Chronology Testimony by Case Agent and Physical**  
15 **Demonstrative**

16 The forensic evidence from defendant's phone has also aided in  
17 the case agent's ability to reconstruct a forensic timeline of  
18 defendant's relationship with N.B. The FBI has prepared a calendar  
19 of March through December 2012 identifying the dates when, based on  
20 cell tower information from N.B.'s phone and communications on N.B.  
21 and defendant's phone, victim N.B. appeared to be in Riverside,  
22 California. The calendar also identifies the dates when the two  
23 appeared to be in the same geographic location outside of Riverside,  
24 California, as well as the window of time when, according to  
25 defendant's training records, he was in Georgia for training while  
26 N.B. remained in Riverside, California.

27 In explaining how Agent Staab was able to populate the contents  
28 of the calendar, he should be permitted to testify as to the contents

1 of the specific text communications that enabled him to conclude  
2 where victim N.B. and defendant were on particular dates. Agent  
3 Staab should also be permitted to reference statements made to him by  
4 the victim in her interviews for the purpose of showing his  
5 investigative steps. For example, victim N.B. has never been able to  
6 provide an exact date of either of the charged rapes (indeed, she has  
7 expressly tried not to avoid creating an "anniversary" for these  
8 traumatic experiences to relive each year), but she was able to  
9 provide the FBI with key descriptors like the evening's heat, a  
10 broken bathroom fan, and an abrasion to her arm, among others. Agent  
11 Staab should be permitted to explain why he identified messages about  
12 these topics as significant.<sup>5</sup>

13 This calendar will aid the jury in understanding the context of  
14 the text messages between defendant and N.B. by providing an easy  
15 visual reference to whether N.B. would have been in Riverside,  
16 California, at the time of the conversation, or back at her parents'  
17 house in Simi Valley. The United States has prepared two physical  
18 enlargements of this calendar to have on easels during Agent Staab's  
19 testimony so that the jury can have the benefit of the calendar while  
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21  
22 <sup>5</sup> Most of these messages are admissible anyways through various  
23 hearsay exceptions, as outlined in the Original Trial Memo, e.g., as  
24 statements by defendant, as statements by N.B. reflecting her then-  
25 existing mental, emotional, or physical condition, or her present  
26 sense impression, or an excited utterance. However, to the extent no  
27 such exception applies, or the statements are being offered solely  
28 for the effect on the listener, the Court should nonetheless permit  
Agent Staab to introduce such statements and explain their relevance  
to the investigation because the United States bears the burden of  
proving that the events in question occurred on or about the dates as  
charged in the Indictment. If necessary, the Court can give a  
limiting instruction to the jury that the evidence is being  
introduced solely for the purpose of showing Agent Staab's course of  
conduct in the investigation, and not for the truth of a specific  
statement.

1 reviewing the text messages themselves on the computer screens. Such  
2 physical demonstratives are admissible at the Court's discretion if  
3 they would aid in the jury's understanding of the evidence in this  
4 case, which this calendar undeniably will. Indeed, at the last  
5 trial, defendant himself introduced a September 2012 calendar (Def.  
6 Ex. 504) to achieve a similar effect by providing context to the  
7 messages and enabling the jury to match days of the week to the  
8 events in question.

9 **D. Exhibit Reflecting Defendant's Admissions from State Court**  
10 **Change of Plea Hearing**

11 As set forth above, this Court has already ruled that the United  
12 States can introduce a sanitized version of defendant's statements  
13 from his state change of plea hearing that eliminates any reference  
14 to the proceeding being a change of plea hearing. The parties are  
15 meeting and conferring about the exact format by which the  
16 introduction of those admissions will occur.

17 The complete transcript itself as certified by the court  
18 reporter is currently Government's Exhibit 98 and would be admissible  
19 as a self-authenticating certified court record under Rule 902(4).  
20 Thus, the traditional way of introducing statements from a transcript  
21 would be to simply admit the relevant pages through the case agent or  
22 another witness familiar with the records. As discussed in the  
23 government's motion, however, that would necessitate showing the jury  
24 that these statements were made as part of a state court change of  
25 plea hearing. Therefore, as proposed in the motion, and as approved  
26 by the Court, the United States proposed introducing a summarized  
27 version of these statements that maintains their accuracy, but scrubs  
28 them of any reference to a criminal change of plea hearing.

1       The United States has provided defendant with a proposed  
2 stipulation containing Exhibit 98A, which sets forth the summarized  
3 statements approved by the Court (i.e., the "defendant previously  
4 admitted . . . ") and the parties' agreement that they were derived  
5 from the authentic transcripts. To the extent defendant does not  
6 agree to these summaries, the United States proposed two  
7 alternatives: (1) heavily redacting the transcript, which would  
8 maintain the question-and-answer format; or (2) revising the  
9 transcript itself to reflect the summarized statements approved by  
10 the Court. These alternatives are not as close to what the Court  
11 ordered as proposed Exhibit 98A, but they are closer to the original  
12 transcript.

13       The United States remains open to meeting and conferring with  
14 defendant on the least objectionable format through which it may  
15 introduce these admissible statements, recognizing that defendant  
16 maintains his objections to their admissibility in the first place.

17       **E.     References to the First Trial**

18       The parties have conferred and agree that neither the parties  
19 nor the witnesses should refer to the first federal trial or the  
20 Court's order declaring a mistrial in this case. To the extent a  
21 reference is necessary, i.e., to impeach a witness with his or her  
22 prior testimony from the first federal trial, the parties agree to  
23 refer to the first trial as a "prior proceeding" and would ask that  
24 the Court do the same. See, e.g., Ninth Circuit Manual of Model Jury  
25 Instructions No. 2.16, Defendant's Previous Trial ("A preferable  
26 practice is to avoid all reference to prior trials.")  
27  
28

1   **V.    CONCLUSION**

2           The United States respectfully requests leave to supplement this  
3 Trial Memorandum, as necessary.